the ancient fiction that decisions are only evidence of the law should be discarded. It is significant that in nearly every case where that fiction conflicts with obvious justice, the courts are disregarding it and reaching the just result; [18] that they are more and more coming to acknowledge that they do make law [19] and to act on that principle.

IS A CHANGE OF JUDGES IN THE COURSE OF A CRIMINAL TRIAL UNCONSTITUTIONAL? — The words of Mr. Justice Holmes in *Kepner* v. *United States*,[1] "there is to-day more danger that criminals will escape justice than that they will be subjected to tyranny," seem to be justified once more by the recent decision of the Circuit Court of Appeals, Second Circuit, in *Freeman* v. *United States* (not yet reported). In that case the defendant was being tried for a statutory misdemeanor. The presiding judge became ill in the middle of the trial, and another was appointed to take his place, with the express assent of the defendant. The court held that the substitution was a violation of the defendant's inalienable right of trial by jury, a right which he could not waive. With all deference, the opinion is not as convincing as one could wish. It is mostly a resumé of cases, with some stress laid on *Crain* v. *United States*,[2] which was expressly overruled by the Supreme Court two years ago.[3]

The decision raises the old question of the meaning of the provisions of Article III, Section 2, Clause 3, as explained or modified by the Sixth Amendment.[4] By the rules of constitutional construction, "trial by jury" is given the meaning it had in England when the Constitution was framed, that is, trial by a jury of twelve men, presided over by a court.[5] There seems, however, to have been no common-law rule that the judges must remain the same throughout the trial.[6] The question has

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ate retrospectively. It may do so in all cases except where it would impair contract or property rights or make innocent acts criminal; but the overruled decision should be the law to govern all vested rights acquired, and all acts which it declared innocent, committed before its reversal.

[18] See cases cited in notes 5, 9, and 10.

[19] Holmes, J., *dis.*, in Kuhn *v.* Fairmont Coal Co., 215 U. S. 349, 371: "That fiction [that courts only declare the law] had to be abandoned and was abandoned when this court came to decide the municipal bond cases. In those cases the court followed Chief Justice Taney . . . in recognizing the fact that the decisions of the state courts of last resort make the law for the state. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of law. . . . Whatever it [the law of the state] is called it is the law as declared by the state judges and nothing else."

[1] 195 U. S. 100, 134.

[2] 162 U. S. 625.

[3] Garland *v.* Washington, 232 U. S. 642, 647.

[4] "The trial of all crimes, except in cases of impeachment, shall be by jury." CONST., Art. III, Sec. 2, Cl. 3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense." Amendment VI.

[5] 1 HALE, PLEAS OF THE CROWN, 33; See Lamb *v.* Lane, 4 Oh. St. 167, 179; Capital Traction Co. *v.* Hof, 174 U. S. 1, 13.

[6] The opinion practically admits this, as Rogers, J., says: "An examination of the cases in the English courts discloses no warrant for believing that a substitute of judges

never come before the federal courts, and the state decisions are brief and conflicting.[7] It has been decided, however, that a judge who did not preside at the trial may hear a motion for a new trial [8] or impose sentence.[9] Although it may be said in these cases that the defendant has had his requisite trial by jury before the change occurs, the practical effect of the substitution is identical with that in the principal case, and the language used in the opinions covers both.[10] In both cases the second judge is equally capable of performing his functions if he acquaints himself with the testimony from the record. Nor is it essential that he should see and hear the witnesses, for it is always permissible to give evidence by deposition if the opponent consents.[11] Indeed, the essential propriety of the proceedings is shown by the fact that had the parties gone through the formality of agreeing to start the trial again, to accept the present jury, and to have the evidence already presented read from the record, no question of constitutionality could have been raised.

The court, however, deciding that the defendant did not have a "trial by jury" within the meaning of the Constitution, had to consider whether he had not waived his rights by assenting to the procedure. They concluded that the constitutional provisions did not confer a privilege on the defendant, but imposed a mandate on the courts, for the purpose of protecting the public interest that the accused should be safeguarded, even against his will. The result seems in accordance with authority. On similar reasoning, the Circuit Court of Appeals for the First Circuit has held that a defendant cannot consent to the withdrawal of a juror and a consequent verdict by eleven only.[12] Many state courts, however, have reached a contrary result,[13] but under constitutional pro-

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would be sustained without a trial *de novo*." This seems rather a negative way of sustaining the burden of proof. In fact, two of the cases cited show that a change of judges was not objected to, at least in misdemeanors. See Rex *v.* Pinney, 5 Car. & P. 254; Queen *v.* O'Connell, 11 Cl. & F. (App. Cases) 155.

[7] The following cases have held similar proceedings valid: People *v.* Henderson, 28 Cal. 465; People *v.* Cassalman, 10 Cal. App. 234, 101 Pac. 693; York *v.* State, 91 Ark. 582; Foson *v.* Commonwealth, 12 S. W. 263 (Ky.). See State *v.* Lautenschager, 22 Minn. 514. *Contra:* People *v.* Norton, 76 Hun (N. Y.) 7; People *v.* Shaw, 63 N. Y. 36; Durden *v.* People, 192 Ill. 493, 61 N. E. 317. In the cases where the trial was held invalid it did not appear that the new judge read the record, or that the defendant assented to the substitution.

[8] United States *v.* Meldrum, 146 Fed. 390; People *v.* McConnell, 155 Ill. 192, (40 N. E. 608). See United States *v.* Harding, 1 Wall. Jr. 127, Fed. Cas., No. 15,301; Fire Insurance Co. of New York *v.* Wilson, 8 Pet. (U. S.) 291. The rule of these cases has since been incorporated in a statute. R. S., § 953.

[9] Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

[10] See Fire Insurance Co. of New York *v.* Wilson, *supra*. At page 303 Mr. Justice McLean says: "He [the new judge], as the successor of his predecessor, can exercise the same powers, and has the right to act in every case that remains undecided upon the docket as fully as his predecessor could have done. The court remains the same, and the change of incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

[11] Diaz *v.* United States, 223 U. S. 442; Reynolds *v.* United States, 98 U. S. 145.

[12] Dickinson *v.* United States, 159 Fed. 801. See 8 COL. L. REV. 577. *Accord:* People *v.* O'Neill, 48 Cal. 257. *Cf.* Queenan *v.* Oklahoma, 190 U. S. 548. See also United States *v.* Shaw, 59 Fed. 110, 114.

[13] State *v.* Kaufman, 51 Ia. 578, 2 N. W. 275; Commonwealth *v.* Dailey, 12 Cush.

visions not so clearly mandatory as that of Article III. It is clear that a jury may be waived entirely in minor offences,[14] but only when the punishment does not exceed (imprisonment for) one year.[15] This distinction is based on the fact that such petty crimes were not tried by jury at common law. The defendant, of course, may always relinquish his rights by pleading guilty; [16] the right of being present in court may be waived,[17] as also that of confronting the witnesses,[18] at least where a capital offence is not involved. It seems, however, that the words of Article III must be taken as imposing a command, as distinguished from these privileges granted by the amendment.[19] Consequently, since the offense in the principal case was too serious to come within the rule of the *Schick* case,[20] the court's decision on the question of waiver seems correct.

This point need never have been raised, however, as the court was backed by neither reason nor authority in deciding that the defendant had not, in fact, had his constitutional trial by jury. It is noteworthy that the recent decisions of the Supreme Court show a decided tendency to treat technical requirements less as fundamental rights than as matters of procedure.[21] In fact, the theory of a public interest to safeguard the prisoner, whether regarded as an example of over-tender regard for the accused, or as a survival of the eighteenth century notion of protection against a tyrannical magistracy, is rather out of date.[22] In view of the practical consequences of the decision, it is especially unfortunate that the court felt compelled to force the principal case within the terms of the constitutional command. In the first place, the defendant is given an opportunity to gamble on his chances at the first trial, sure of a reversal above if he loses. Moreover, the sickness or death of a judge in the middle of a criminal trial will necessitate a trial *de novo*, the recall of all the witnesses, and a great expenditure of money and time; all this without any real gain in substantial justice.

(Mass.) 80; State *v.* Sackett, 39 Minn. 69, 38 N. W. 773. But see *contra:* Cancemi *v.* People, 18 N. Y. 128; People *v.* Stewart, 64 Cal. 60. *Cf.* the last case with the California cases cited in n. 6, *supra.*

[14] Schick *v.* United States, 195 U. S. 65; Darst *v.* People, 51 Ill. 286; Logan *v.* State, 86 Ga. 266, 12 S. E. 406; State *v.* Woodling, 53 Minn. 142, 54 N. W. 1068. See Belt *v.* United States, 4 App. Cas. (D. C.) 32. See WILLOUGHBY, CONSTITUTIONAL LAW, 419 *et seq.*

[15] Low *v.* United States, 169 Fed. 86; Territory *v.* Ortiz, 8 N. Mex. 154, 42 Pac. 87. See 9 HARV. L. REV. 353.

[16] State *v.* Almy, 67 N. H. 274, 28 Atl. 372. See State *v.* Kaufman, 51 Ia. 578, 580, 2 N. W. 275, 276.

[17] Diaz *v.* United States, 223 U. S. 442; United States *v.* Shepherd, 1 Hughes 520. But see Hopt *v.* Utah, 110 U. S. 574.

[18] Diaz *v.* United States, *supra;* State *v.* Polson, 29 Ia. 133.

[19] See Low *v.* United States, 169 Fed. 86, 91. But *cf.* Belt *v.* United States, 4 App. Cas. (D. C.) 32.

[20] See n. 14, *supra.*

[21] See Hawaii *v.* Mankichi, 190 U. S. 197. At page 218 Mr. Justice Brown says: "The rights (jury trial and indictment by grand jury) alleged to be violated are not fundamental in their nature, but concern merely a method of procedure." See Garland *v.* Washington, 232 U. S. 642, 646. See also Diaz *v.* United States, *supra. Cf.* Hopt *v.* Utah, *supra.*

[22] See MCCLAIN, CONSTITUTIONAL LAW, §§ 243, 254; 25 HARV. L. REV. 179.